STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ZACKERY LOGAN ABBOTT and SKYLEE LAZAVIA JEAN WALKER, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

DAVID RANDALL ABBOTT II,

Respondent-Appellant,

and

KENNY WALKER,

Respondent.

UNPUBLISHED
February 23, 2010

No. 294372
Genesee Circuit Court
Family Division
LC No. 05-119199-NA

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

Respondent David Randall Abbott, II ("respondent"), appeals as of right from an order terminating his parental rights to his two minor children. We affirm.

Defendant first argues that there was insufficient evidence to support termination of his parental rights under MCL 712A.19b(3)(c)(i) and (ii), (g) and (j). We do not address defendant's arguments with respect to §§ (c)(ii), (g) and (j), because we find that the evidence clearly and convincingly established the statutory basis for termination of rights under § (c)(i).

Review of a finding regarding a statutory ground for termination is for clear error. A finding can only be set aside if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made. MCR 3.977(J); *In re Jordan*, 278 Mich App 1, 24; 747 NW2d 883 (2008). To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Trejo*, 462 Mich 341, 356; 612 NW2d 407 (2000), quoting *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). Further, regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

MCL 712A.19b(3) provides in pertinent part:

> The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> * * *
>
> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

Here, the conditions that led to the initial adjudication included "substance abuse". Respondent points out that he was initially using cocaine, and that his cocaine use had stopped. However, it is undisputed that respondent repeatedly used marijuana during the year preceding termination of his parental rights. Although respondent claimed that this use was to control his anxiety in lieu of medication, this is not compelling. We conclude that the evidence clearly and convincingly established that substance abuse continued.

Respondent testified that his use of marijuana had ended and that he would be ready to take the children in 90 days. However, the lapse of time between the 2005 petition and the 2009 termination hearing indicated that this was not a "reasonable likelihood". Given respondent's inability to cease using substances up to that point, there is little indication, other than his own belief and assertions, to indicate he would be ready to assume responsibility for these young children within a reasonable time.

Respondent next argues that termination of parental rights was not in the children's best interests given the bond between him and the children. A court's decision regarding the child's best interest is reviewed for clear error. *In re Trejo*, 462 Mich at 356-357. We find no clear error.

MCL 712A.19b(5) provides:

> If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made.

This statute was amended effective July 11, 2008. Before that time, the court had to find that termination of parental rights was "clearly not in the child's best interests."

In the present case, the trial court began its best interests analysis by stating the wrong test, but concluded by affirmatively stating that termination would be in the children's best interests. We note that use of the incorrect test is subject to a harmless error analysis. *In re*

Hansen, 285 Mich App 158, 163-164; 774 NW2d 698 (2009). Given the ultimate correct enunciation of the test, we conclude that any error was harmless.

Although respondent claims that he had a bond with his children, the evidence indicates that it was tenuous at best. He did not play a role in their lives for approximately two years while they were approximately two to four and four to six years of age. Moreover, the evidence indicated that the advantages of the foster home were significant. This evidence was appropriately considered in the best interests determination. *In re Foster*, 285 Mich App 630, 635; 776 NW2d 415 (2009). Here, the children had been in their foster home since the separation from their parents in 2005. They regarded their foster parents as their parents. Moreover, the lack of certainty apparently was causing distress that required therapy. Therefore, we find no clear error in the court's determination that stability, permanency, and consistency were in the children's best interests.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Alton T. Davis